IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REGINALD T. GILBERTBEY, Plaintiff,	CIVIL ACTION NO. 05-69E
v.	Judge Sean J. McLaughlin
UNITED STATES OF AMERICA, et al., Defendants.	Magistrate Judge Baxter *Electronically Filed*

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Pro se inmate, Reginald T. Gilbertbey, filed an Amended Complaint[1] in this action alleging that his constitutional rights were violated in connection with his conditions of confinement at FCI McKean and seeking to hold defendants, the United States of America, Department of Justice, Federal Bureau of Prisons ("BOP"), and FCI McKean ("Defendants") liable under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiff seeks only injunctive relief in his Amended Complaint.[2] Specifically, in his Amended Complaint,

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[1]Federal Rule of Civil Procedure 15(a) allows a party to amend the complaint once as a matter of course at any time before a responsive pleading is served. The law is clear, however, that the filing of an Amended Complaint supercedes the original complaint and renders it a legal nullity. See Snyder v. Pascack Valley Hosp., 303 F.3d 271, 276 (3d Cir. 2002).

[2]In his original Complaint, Plaintiff also requested injunctive relief in the form of an Order from the Court that (1)he not be transferred from the Federal Correctional

Plaintiff reports that on May 17, 2005, after dinner, he declared that he was on a "hunger strike". He then alleges that he was placed in isolation in the Special Housing Unit ("SHU"), threatened with forced feeding, and that his access to water was controlled by staff. The relief that Plaintiff seeks in his Amended Complaint is an Order from the Court that the forced feeding be video-taped and that it not be done through his nasal passage. In addition, he requests the further injunctive relief that the Court order all copies from his Central file be provided at no cost; a stay of all pending disciplinary charges; and an immediate transfer to FMC Lexington.

The Court, however, should dismiss Plaintiff's Amended Complaint in its entirety. Plaintiff's Bivens claims against the United States and the federal agency defendants must fail as a matter of law because public entities are not subject to personal liability lawsuits under Bivens. In addition, Plaintiff has failed to properly exhaust his administrative remedies on all of his claims prior to filing suit in this court. Finally, Plaintiff's claims are moot because his hunger strike has ended

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Institution ("FCI"), McKean; (2)immediate seven days a week five hours per day access to McKean's law library and certain BOP policy statements, self help litigation manual, and certain sections of the C.F.R.; (3) stationary supplies; (4) a typewriter; (4)legal copies, (5) stamps, (6) immediate release from the SHU and return to his job assignment at FCI McKean. As the Truman Dec., Ex. "A" makes clear, Plaintiff did not exhaust his administrative remedies on these issues either.

without the necessity of an involuntary treatment and because he was transferred to the United States Penitentiary in Allenwood, Pennsylvania (USP Allenwood) in December of 2005 and is not entitled to injunctive relief relating to the conditions of confinement at his prior institution, FCI McKean. Alternatively, summary judgment in favor of Defendants is appropriate.

II. STATEMENT OF FACTS

Plaintiff Reginald Thaddeus Gilbert-bey, Reg. No. 03854-078, is currently incarcerated for convictions of 21 U.S.C. 846, 841(a)(1) & (b)(1)(A), and 18 U.S.C. 1952, conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, intent to facilitate distribute cocaine with violence, by the United States District Court for the Eastern District of Texas. On April 9, 1993, Plaintiff was ordered to serve 360 months incarceration followed by 5 years supervised release. He began service of his sentence immediately. His projected date for release is August 26, 2018 via good conduct time earned. He was designated to FCI McKean from November 18, 2004 until December 16, 2005. He is currently designated to the United States Penitentiary (USP) in Allenwood, Pennsylvania. See Declaration of Roberta M. Truman, Attorney Northeast Regional Office for the Federal Bureau of Prisons, attached hereto as Exhibit "A" ("Truman Dec.").

In the Amended Complaint, Plaintiff indicates that he declared a hunger strike while housed in the SHU at FCI McKean. Indeed, Plaintiff's hunger strike began May 18, 2002. He then refused the next 9 meals. Accordingly, in compliance with BOP policy and regulations[3], on Friday May 20, 2002, Plaintiff was placed in a cell alone and his intake and output of fluids, as well as his weight, were monitored and recorded. Staff recorded that he was offered an adequate supply of drinking water and 3 meals per day. He also was seen by a Physician Assistant ("PA"), the psychologist, and by a physician on a routine basis during his hunger strike. Staff attempted to convince Plaintiff to voluntarily accept medical treatment and also explained the involuntary treatment option of a nasogastric tube, if required. It was clearly explained to Plaintiff that if he did not want involuntary treatment, he could voluntarily drink the medical treatment and avoid the nasogastric tube. The SHU records reveal that Plaintiff did accept the medical treatment on June 9, 2005

[3]When an inmate goes on a hunger strike, it is the BOP's responsibility to monitor the health and welfare of the inmate and follow procedures to preserve life. See 28 C.F.R. § 549.60-62(b),64-65(a) and (b). When a physician determines the inmate's life or health is threatened, involuntary medical treatment is then considered. 28 C.F.R. § 549.65(a). Prior to involuntary medical treatment being initiated, staff must make reasonable efforts to convince the inmate to voluntarily accept treatment, including an explanation of the involuntary treatment procedure as referenced in the Amended Complaint. 28 C.F.R. § 549.65(b). See Truman Dec., Exhibit "A".

to end the hunger strike and that there was no involuntary treatment or necessity for use of the nasogastric tube. See Truman Dec., Exhibit "A".

Plaintiff filed no administrative remedies regarding his hunger strike. The hunger strike ended several months prior to his transfer to USP Allenwood. See Truman Dec., Exhibit "A". Plaintiff also failed to properly exhaust his administrative remedies regarding the other issues for which he seeks injunctive relief in his Amended Complaint, such as the request for copies of his Central File, a stay of all disciplinary charges, or his request for a transfer to FMC Lexington. See Truman Dec., Exhibit "A".

III. APPLICABLE LEGAL STANDARDS

A. Motion to Dismiss for Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) is the appropriate method by which to challenge the legal sufficiency of claims in a complaint. See Fed. R. Civ. P. 12(b)(6); Raines v. Haverford College, 849 F. Supp. 1009, 1010 (E.D. Pa. 1994). Although courts reviewing Rule 12(b)(6) motions generally consider only the allegations in the complaint, courts are also free to examine any attached exhibits attached, other undisputed documents relied on by the plaintiff, other items appearing in the record of the case, and matters of public record. Raines, 849 F. Supp. at 1019; see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38

F.3d 1380, 1384 n.2 (3d Cir. 1994). Indeed, if a court could not consider such documents, "`a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which [he] relied.'" Interfaith Community Org. v. AlliedSignal, Inc., 928 F. Supp. 1339, 1345 (D.N.J. 1996) (quoting Dykes v. Southeastern Pa. Trans. Auth., 68 F.3d 1564, 1567 n.3 (3d Cir. 1995)).

While courts considering motions to dismiss have a limited role, these courts should grant such motions where it is clear that no relief could be granted under any set of facts that are consistent with the allegations of a complaint. AlliedSignal, 928 F. Supp. at 1346. The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff has any chance of doing so. Id.; Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

B. Motion For Summary Judgment

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). That is, Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The plaintiff cannot merely rest on allegations in his complaint. Id. at 324. To defeat a motion for summary judgment, "the nonmoving party must adduce more than a mere scintilla of evidence in his favor." Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

IV. ARGUMENT

A. The Doctrine of Sovereign Immunity Bars Plaintiff's Bivens Action Against the United States of America, Federal Bureau of Prisons, Department of Justice and FCI McKean

An allegation that a federal employee has deprived an individual of constitutionally protected rights while acting under color of federal authority can state a claim for relief implied directly from the Constitution. Bivens v. Six Unknown Named Federal Bureau of Narcotics Agents, 403 U.S. 388 (1971)(hereinafter referred to as "Bivens"). However, Plaintiff cannot properly bring a Bivens action against the United States and its agencies such as the only Defendants, United States of America, Federal Bureau of Prisons, Department of Justice, and FCI McKean in this case.

It is well settled that the doctrine of sovereign immunity bars Bivens actions against the United States and its federal agencies. Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, 484-86 (1994); United States v. Mitchell, 463 U.S. 206, 213 (1983); United States v. Testan, 424 U.S. 392 (1976); Jaffee v. United States, 592 F.2d 712, 717 (3d Cir. 1979) ("Because [plaintiff] has sued the government itself, Bivens . . . does not afford him a traversable bridge across the moat of sovereign immunity"); Johnstone v. United States, 980 F. Supp. 148, 151 (E.D. Pa. 1997) (explaining that Bivens actions "may only be maintained against federal officers; sovereign immunity bars such actions against the United States or agencies thereof."). Bivens does not waive the sovereign immunity of the federal government, and Bivens-type actions against federal entities are routinely dismissed for lack of subject-matter jurisdiction. See Johnstone, 980 F. Supp. at 151; Gagliardi v. United States, No. 89-8859, 1991 WL 9361, at *5 (E.D. Pa. Jan. 28, 1991).

Therefore, Plaintiff's Bivens action against the only Defendants in this case, the United States of America, Federal Bureau of Prisons, Department of Justice and FCI McKean, plainly is barred by the doctrine of sovereign immunity and, therefore, must be dismissed.

B. Plaintiff's Amended Complaint Should Be Dismissed Because Plaintiff Was Transferred To Another Federal Prison Rendering the Injunctive Relief He Seeks Moot.

Plaintiff seeks only injunctive relief regarding his conditions of confinement at FCI McKean in his Amended Complaint. However, Plaintiff was transferred to USP Allenwood, an institution outside the jurisdiction of this Court, on December 16, 2005, rendering his claims for injunctive relief relating to FCI McKean moot. As such, Plaintiff's Amended Complaint should be dismissed for want of jurisdiction.

It is axiomatic that the federal courts may not decide an issue unless it presents a live case or controversy. See DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806, 810-11 (3d Cir. 1989). This limitation "derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." DeFunis, 416 U.S. at 316 (quoting Liner v. Jafco, Inc., 375 U.S. 301, 306 (1964). See also Abdul-Akbar v.Watson et al, 4 F.3d 195, 206 (3d Cir. 1993). A case is moot, and thus not an Article III case or controversy, when the issues are no longer live or the plaintiff is unable to benefit from the relief requested. Murphy v. Hunt, 455 U.S. 478, 481 (1982); Daly v. Wigen, 1994 WL 35003 *1 (E.D.Pa. Feb. 7, 1994). Once the controversy ceases to exist, the court must dismiss the case for lack of jurisdiction. United States v. Kissinger, 309 F.3d 179, 180 (3d Cir. 2002)(citing Lewis v. Continental Bank Corp., 494 U.S. 472, 477-78 (1990)); Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992). The question a federal court must ask is whether circumstances have changed such that there is no occasion for providing the plaintiff with meaningful relief. Int'l Brotherhood of Boilermakers v. Kelly, 815 F.2d 912, 915 (3d Cir. 1987).

The law is clear that an inmate's transfer from the facility complained of generally moots the injunctive and declaratory claims. Abdul-Akbar, 4 F.3d at 197 (former inmate's claim that prison law library's legal resources were constitutionally inadequate was moot because plaintiff was released five months before trial). See also Sutton et al. v. Rasheed et al., 323 F.3d 236, 248 (3d Cir. 2003) (where none of inmate plaintiffs remain confined at prison complained of, plaintiffs no longer present a justiciable claim for declaratory and injunctive relief); Daly, 1994 WL 35003 *1-2 (where plaintiff was transferred to another correctional institute and cannot benefit from the equitable relief he requests in his complaint, claim must be dismissed as moot.)

In this case, it is clear that the circumstances have changed such that there is no occasion for providing the Plaintiff with meaningful injunctive relief that he seeks in his Amended Complaint. Plaintiff seeks injunctive relief regarding to his conditions in the SHU during his hunger strike at FCI McKean. However, it is undisputed that Plaintiff's hunger strike ended voluntarily on June 9, 2005 and Plaintiff was transferred to USP Allenwood on December 16, 2005. Accordingly, the injunctive relief requested in Plaintiff's Amended Complaint (i.e. an order that the forced feeding be video taped and not be done through his nasal passage; all copies from his Central file be provided at no cost; a stay of all pending disciplinary charges; and, an immediate transfer to FMC Lexington) was rendered moot by the cessation of the hunger strike and Plaintiff's transfer to USP Allenwood. See also Lane v. Williams, 455 U.S. 624(1982); Corbett v. Luther, 778 F.2d 950 (2d Cir. 1985); McClendon v. Trigg, 79 F.3d 557 (7th Cir. 1996); Johnson v. Riveland, 855 F.2d 1477 (10th Cir. 1988); Vanderberg v. Rogers, 801 F.2d 377 (10th Cir. 1986).

Moreover, this case does not present a question that is capable of repetition, yet evading review. The "capable of repetition" doctrine is a very narrow exception to the mootness principle and is limited to situations where there is a reasonable likelihood that the same complaining party would be subject to the same action at the same location again. Weinstein v. Bradford, 423 U.S. 147, 149 (1975). Here, Plaintiff is no longer housed at FCI Mckean and is no longer on a hunger strike. There is no reasonable likelihood that Plaintiff will return to FCI McKean and begin a hunger strike again there. See Abdul-Akbar, 4 F.3d at 206-207. As such, the Court cannot fashion any meaningful injunctive remedy given the fact that the hunger strike ended in June of 2005 and Plaintiff was transferred outside this jurisdiction in December of 2005. As such, Plaintiff's claims seeking injunctive relief at FCI McKean must be dismissed as moot.

C. Plaintiff Has Failed to Exhaust his Available Administrative Remedies on All Claims Raised in His Amended Complaint

Even if they were not moot, Plaintiff's claims are subject to swift dismissal due to Plaintiff's failure to properly exhaust his administrative remedies prior to instituting suit. The Prison Litigation Reform Act of 1995, as amended 42 U.S.C. 1997e (a) (PLRA), requires a prisoner to exhaust "such administrative remedies as are available" before suing over prison conditions. The statute provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or an other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e.

In Booth v. Churner, 532 U.S. 731 (2001), the United States Supreme Court unanimously held that under the PLRA, an inmate must complete any prison administrative remedy process capable of addressing the inmate's complaint and providing some form of relief before seeking adjudication on issues involving prison conditions. The Court also closed the door on any futility arguments made by the inmate, stating, "we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." Id. at 1825. The Supreme Court reaffirmed this holding in Porter v. Nussle, 534 U.S. 516(2002). See also Spruill v. Gillis, 372 F.3d 218, 228(3d Cir. 2004);

Nyhuis v. Reno, 204 F.3d 65, 78(3d Cir. 2000)(PLRA makes exhaustion mandatory in all cases); Alexander v. Hawk, 159 F.3d 1321(11th Cir. 1998)(futile and inadequate nature of administrative remedy did not preclude mandatory exhaustion requirement of the PLRA). The Supreme Court has clarified that Section 1997(e) of the PLRA requires a prisoner to exhaust his administrative remedies when alleging "particular episodes of misconduct- which includes an act of retaliation". In Spruill, the Court found that Congress enacted this mandatory exhaustion requirement to: return control of the inmate grievance process to prison administrators; to encourage development of an administrative record; and to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits. Spruill at 230. Furthermore, the Court of Appeals for the Third Circuit held that an inmate's failure to follow the procedural requirements of the Administrative Remedy process will result in a procedural default. Spruill at 234.

Most recently, in Woodford v. NGO, 2006 WL 1698937 (June 22, 2006), the Supreme Court held that under the PLRA, exhaustion is not left to the discretion of the district court, but is mandatory in any suit challenging prison conditions. Id. at *2. The Court further held that the PLRA exhaustion requirement requires "proper exhaustion", which means "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)". Id. at *5. Proper exhaustion, the Court explained, demands compliance with an agency's deadlines and other critical procedural rules because "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings". Id. at *5.

The structure that BOP created to ensure the issues are resolved quickly and expeditiously, sets forth mandatory time frames for inmates to file their requests. 28 C.F.R. §542.14(a) & (b) and 28 C.F.R. §542.15(a). This system is designed to reduce the number of inmate cases in the courts and to allow the Bureau of Prisons to initially resolve any problems. Thus, in order to exhaust all process under the administrative remedy procedure for inmates, an inmate must first attempt to informally resolve the dispute with institution staff. 28 C.F.R. § 542.13. If informal resolution efforts fail, the inmate may raise his or her complaint to the Warden of the institution in which he or she is confined, within 20 calendar days of the date that the basis of the complaint occurred. 28 C.F.R. § 542.14. If the Warden denies the administrative remedy request, the inmate may file an appeal with the Regional Director within 20 calendar days of the date of the Warden’s response. 28 C.F.R. § 542.15. If the Regional Director denies the appeal, the inmate may appeal that decision to the General Counsel of the Federal Bureau of Prisons within 30 calendar days from the date of the Regional Director’s response.

See 28 C.F.R. § 542.15. The administrative remedy process is not considered to be "exhausted" until an inmate's final appeal is denied by the Bureau of Prisons General Counsel.

In the ordinary course of business, hard copies of the administrative remedy filings of inmates incarcerated in the Northeast Region of the Bureau of Prisons, who have accessed the Administrative Remedy process at least up to the Regional level are maintained in the Northeast Regional Office. A review of the administrative remedy filings of the Plaintiff, inmate Reginald T. Gilbertbey, Register Number 03854-078, indicates that Plaintiff has filed 131 Administrative Remedies during his incarceration to date. In 2005, he filed administrative remedies with the **Warden only** concerning medical and dental treatment, issues not raised in his Amended Complaint in this case. However, Plaintiff failed to appeal the Warden's responses and denied the BOP an opportunity to correct any problems or concerns. He has not filed an Administrative Remedy concerning any of the issues raised in his Amended Complaint, i.e., access to copies of his Central file, a hunger strike, or a transfer to FMC Lexington. See Declaration of Roberta Truman attached hereto as Exhibit "A". Therefore, Plaintiff has not exhausted his available administrative remedies on the issues raised in his Amended Complaint.

Under the Bureau of Prisons regulations, Plaintiff had 20 days from the date that the incident occurred in which to access the first level of the administrative remedy process. See 28 C.F.R. § 542.14. Because well over 20 days has expired since any of the conduct alleged in Plaintiff's Amended Complaint in this civil action was alleged to have occurred, Plaintiff has procedurally defaulted on all issues raised in this Amended Complaint, and may not raise these issues either in an administrative remedy or in a civil action. See Moscato v. Federal Bureau of Prisons, 98 F.3d 757 (3d Cir. 1996).

Therefore, because Plaintiff failed to exhaust his available administrative remedies on all issues set forth in his Amended Complaint, the Amended Complaint should be dismissed in its entirety.

D. The Bivens Claims Against The Defendants Should Be Dismissed Based On Improper Service of Process

Service on the United States and its agencies is governed by Rule 4(i)(1)(A) and (2)(A) of the Federal Rules of Civil Procedure. These provisions require that service upon the United States or an agency thereof be effected by delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought or by mailing a copy of the summons and complaint by registered or certified mail to the office of the United States Attorney in the relevant district and by also sending a copy of the summons and complaint to the Attorney General of the United States in Washington, D.C. and by sending a copy of the summons and complaint to the federal agency at issue by registered or certified mail. Where a federal agency is sued, service is effected by serving the U.S. United States Attorney for the district in which the action is brought, the Attorney General in Washington, D.C., and the federal agency defendant.

Plaintiff has sued the United States and several of its agencies, but has failed to serve the U.S. Attorney's Office for the Western District of Pennsylvania with either a Complaint, Amended Complaint or Summons. Indeed, while the docket reflects that service on the U.S. Attorney has been effected, the actual green card indicates that only the Department of Justice in Washington, D.C. has been served. See Docket No. 22.

Accordingly, this Court should dismiss Plaintiff's claims for insufficient service and the resulting lack of jurisdiction.

V. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court dismiss the Amended Complaint in its entirety. In the alternative, Defendants request an entry of judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Pleading was served, by postage paid U.S. Mail, to and upon the following:

Reginald Thaddeus Gilbertbey
Reg. No. 03854-078
US Penitentiary, Allenwood
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White Deer, PA 17887

/s/Jessica Lieber Smolar
JESSICA LIEBER SMOLAR
Assistant U.S. Attorney

Dated: June 27, 2006